

S U M M A R Y O F T H E
REPORT OF THE SELECT COMMITTEE ON WATER MARKETING
TO THE
49TH MONTANA LEGISLATURE
DECEMBER 1984

Senator Jean Turnage, Chair

Representative John Shontz, Vice-Chair

Representative Dan Kemmis
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The Big Sky Country

MONTANA STATE SENATE

December 3, 1984

President of the Senate
Speaker of the House
Montana Legislature

Gentlemen:

No more important natural resource issue faced the 48th Legislature, which met January 3, to April 21, 1983, than the question of marketing Montana's waters. Based upon the work and recommendations of the Select Committee on Water Marketing, whose report I am honored to transmit, Montana's policies for the management, conservation, and use of its waters will be a vital issue facing the 49th and future Legislatures as well.

The 48th Legislature was highlighted by deliberations over whether Montana should market its waters - principally for industrial uses and particularly for coal slurry. There were some who urged us into immediate action based on their prediction that, if Montana did not act swiftly to market its surplus waters, two undesirable results would occur. First, downstream states would satisfy the demand and reap the financial rewards. Worse, in doing so, they would appropriate, put to use, and remove from Montana's eventual use those waters involved.

The 48th Legislature did act to suspend the constitutionally suspect ban against out-of-state exports of water (MCA § 85-1-121) and to allow limited water marketing from Fort Peck and other federal reservoirs. Its members, however, chose not to adopt a hastily conceived and insufficiently understood water marketing program. The Legislature's principal response, with the passage of House Bill 908, was to mandate a two-year study of water marketing by a Select Committee which it has been my privilege to chair.

Events have demonstrated the wisdom of this caution. Although interest in the water marketing concept continues to grow, there has not developed a regional water market. There has been no serious interest in the purchase of water from Fort Peck. In fact, the sale by South Dakota of 50,000 acre feet of water per year from Oahe Reservoir to the ETSI coal slurry pipeline conglomerate has fallen through.



This market hiatus has benefitted the committee's work. When initially proposed to the Legislature, the water marketing concept diverted attention away from the more important issue: what should be Montana's water policy in an interstate setting?

I am pleased to report that, in seven meetings of the Select Committee over the last 19 months, this broader inquiry has been addressed. We have received the insightful testimony of concerned Montana citizens and organizations. We have benefitted from the expertise of practitioners and scholars from Montana and other western states. We have been aided by the cooperative efforts of the departments of Natural Resources and Conservation and Fish, Wildlife, and Parks. The committee is particularly indebted to the Lincoln Institute of Land Policy, which cosponsored two excellent legal and policy seminars on interstate water issues.

The complete final report of the committee is being conveyed to the Legislature under separate cover, and I urge any member who is deeply interested in this topic to consult this very complete document. The summary report I hereby transmit contains a synopsis of the contents of the complete report and sets forth the actions and proposed legislation that have been approved by and are being recommended by the committee.

Many of these recommendations specify those actions that should be taken by the 49th Legislature. Other recommendations set forth an agenda of water issues that must be systematically addressed by the Legislature and the citizens of the state in the years to come. These recommendations concern a strategy for a water policy for Montana in an interstate setting. This agenda is too important and too complex to be addressed by one interim committee or one legislative session. These issues significantly affect the future of Montana. The deliberations around them must be ongoing.

In behalf of all members of the Select Committee, I urge your careful consideration of this report.

Sincerely,

SENATOR JEAN TURNAGE
Chairman

OVERVIEW OF THE COMMITTEE'S RECOMMENDATIONS

The following is an overview of the major recommendations of the Select Committee on Water Marketing to the 49th Legislature.

A. REGULATING THE INTERSTATE MOVEMENT OF WATER

1. Ban on the exportation of water. The statutory ban on the exportation of water from Montana (MCA § 85-1-121) should be permanently repealed; and, with appropriate safeguards, Montana's waters should be permitted to move interstate.
2. Permit criteria. Applications to appropriate large quantities of new water (4000 acre feet/year and 5.5 cubic feet/second) or to change the use or location of presently appropriated water - especially when these applications contemplate the interstate movement of water - should be closely evaluated with reference to detailed public interest criteria (MCA § 85-2-311).
3. Water for coal slurry purposes. With safeguards appropriate to protect the state, its environment, and its citizens, Montana's ban on the use of water for coal slurry purposes (MCA § 85-2-104) should be repealed.
4. Coverage of pipelines under the Major Facility Siting Act. The committee recommends that the siting of all future pipelines exceeding 30 miles in length and 20 inches in diameter be covered by the provisions of the Major Facility Siting Act (MCA § 75-20-101 et seq.).

B. STATE WATER LEASING PROGRAM

5. Limited water leasing program. The committee recommends a limited state water leasing program involving a total of 50,000 acre feet of impounded water. A lease, for a period not to exceed 40 years, would be required to obtain water in any amount for industrial purposes [in any amount for interbasin transfer]* or for amounts in excess of 4,000 acre feet/year or 5.5 cfs for other consumptive beneficial uses. Lease applications would be reviewed under the public interest criteria of MCA § 85-2-311 (as proposed) and, in most cases, through an environmental impact statement.
6. Use of water leasing proceeds. To be determined December 3.
7. Acquisition of water from federal reservoirs. The committee recommends that the Department of Natural Resources and Conservation be granted continued authority to acquire water from all federal reservoirs in the state (as is now the policy under the temporary two-year modification to this section). The committee recommends that the department's authority be clarified to allow acquisition for "any beneficial use."

The existing agreement with the Bureau of Reclamation for the state's acquisition of water from Fort Peck limits the acquisition to industrial water. Under the current agreement the bureau could sell large amounts of water for nonindustrial purposes and avoid sharing revenues with the state. The committee strongly urges that this

* Tentative recommendation of Representative Kemmis

agreement be re-negotiated, and all future agreements be negotiated, to cover water for any beneficial use.

C. MAXIMIZING MONTANA'S FAIR SHARE OF MISSOURI RIVER BASIN WATER

"GETTING MONTANA'S HOUSE IN ORDER"

8. General stream adjudication. The committee urges an expeditious and accurate completion of the statewide water adjudication process. The committee recommends that the Legislature support any justified funding request from the water courts.
9. Indian and federal reserved water rights. The committee recommends support for legislation to extend the Reserved Water Rights Compact Commission for two years and the appropriation of adequate funds for the commission to complete its goals.
10. Water resources data management system. The committee recommends the establishment within DNRC of a centralized water resources data management system making readily accessible to the state's policymakers necessary information on the state's water resources, existing and projected uses, and existing and projected demands.
11. Water reservation system. Water reservations similar to those developed for the Yellowstone River Basin should be prepared for the Missouri River Basin and funds should be appropriated to provide the necessary technical and financial assistance to applicants. Additional funds should be appropriated to ensure adequate monitoring and perfection of the existing Yellowstone River water reservations.

12. State water plan. The committee strongly urges DNRC to comply with the provisions of MCA § 85-1-203 which requires the preparation of a state water plan, its approval by the Board of Natural Resources and Conservation, and its submission to each general session of the Legislature.

13. Water development. The committee recommends continued funding and bonding for identifying, developing, and constructing water projects within the state. The DNRC, Montana's Washington, D. C. office, and the state's Congressional delegation should work actively for the authorization and funding of federal projects within the state.

14. Water policy committee. The committee recommends the creation of a permanent legislative water policy committee to advise the Legislature, in an ongoing way, on water policy and issues of importance to the state.

"RELATING TO OTHER STATES IN THE MISSOURI RIVER BASIN"

15. Preparation for negotiations and possible litigation. Montana should systematically prepare for negotiations and potential litigation with other Missouri River Basin states.

16. Efforts toward an interstate compact. Efforts toward negotiating a compact among the Missouri River Basin states should be a high priority of Montana. While DNRC should have lead responsibility in this effort, the Legislature's water policy committee should be active in and supportive of these efforts.

D. MISCELLANEOUS PROVISIONS

17. Miscellaneous provisions. The committee makes certain miscellaneous and technical recommendations.

DETAILED RECOMMENDATIONS, COMMENTARY, AND

PROPOSED STATUTORY LANGUAGE

A. REGULATING THE INTERSTATE MOVEMENT OF WATER

1. BAN ON THE EXPORTATION OF WATER

Recommendations:

The committee finds that under appropriate circumstances (and as has been the policy for the last two years) the exportation of Montana's water is not in conflict with the public welfare of its citizens or with the conservation of its waters. Thus, the committee recommends that the statutory ban on the exportation of water from Montana (MCA § 85-1-121), which is scheduled to come back into operation of law on July 1, 1985, should not be allowed to revive. The present freedom for water to move interstate, when coupled with the other recommendations of the committee, should be allowed to continue.

Commentary:

With the passage of HB 908, the 1983 Legislature temporarily suspended the provisions of MCA § 85-1-121 that had prohibited the export of water outside the State of Montana unless approved by the Legislature. This suspension was in response to the uncertainty as to the constitutionality of the statute raised by the U.S. Supreme Court's decision in Sporhase v. Nebraska. In its place, the Legislature expanded the criteria enumerated in MCA § 85-2-311 to guide the issuance of a water permit. By the terms of HB 908, these new provisions are to expire on June 30, 1985, with the revival of the pre-existing law, including the export ban.

The Sporhase decision held that Nebraska's statute, which banned the export of groundwater except under limited circumstances, violated the "dormant" interstate commerce clause. Similar litigation concerning the constitutionality of New Mexico's own anti-export ban has been underway in the case of El Paso v. Reynolds. Also, the case of Altus v. Carr (1966) found unconstitutional a Texas statute almost identical to MCA § 85-1-121.

While not completely free of ambiguity, these cases give us helpful guidance in evaluating the constitutionality of Montana's export ban. While each of these three cases involved a prohibition on the exportation of groundwater, we should expect no different analysis by the courts when a state attempts to ban the exportation of surface water. In fact, surface water is more of an interstate commodity than groundwater and invites more scrutiny from the courts in application of the interstate commerce clause.

The conclusion seems inescapable that the provisions of MCA § 85-1-121 are unconstitutional. It is true that the Sporhase decision, in general, allows a state to impose some burdens on interstate commerce as a result of its water management and specifically allows measures by arid states to achieve water conservation for health, welfare, and safety purposes. Such restraints must, however, be closely tailored to achieve the conservation purposes intended.

The provisions of MCA § 85-1-121 fail to achieve such a closely tailored fit. While the section does not impose an absolute ban on exporting, due to the Legislature's ability to approve such a diversion,

the discretion given to the Legislature is unduly broad. No criteria to guide the Legislature's consideration of an export petition are set forth; thus, the decision could be made on any basis. Also, the export petition is not required to be reviewed by DNRC prior to its submission to the Legislature. Consequently, there is no assurance that an export petition would ever be subjected to expert water management scrutiny so as to determine whether the proposal threatens to endanger the health, welfare, or safety of Montanans.

The Legislature has not been faced with a petition for the exporting of water so it is uncertain how such a petition would be processed. While it is possible that the constitutionality of the statute could be salvaged by careful legislative scrutiny of the petition on the basis of water conservation considerations, the Legislature would still face a heavy burden of justifying any denial.

Proposed language:

Section 1. Repealer. Section 85-1-121, MCA, which is scheduled by law to revive on July 1, 1985, is repealed.

2. PERMIT CRITERIA

Recommendation:

The committee recommends that the public interest considerations enacted in 1983, which govern the issuance of water permits in the state (MCA § 85-2-311), be continued. The committee suggests that these criteria be strengthened by including provisions which were recently approved by a federal court in New Mexico. The committee also suggests that, in certain instances, these public interest criteria apply to

applications for a change in use of water. Under certain circumstances, DNRC should undertake rulemaking to more completely implement the permit criteria.

Commentary:

In 1983, the Legislature strengthened the criteria contained in MCA § 85-2-311 governing the issuance of water permits. This modification, effective for two years, added the following major features to the criteria (commonly called "public interest criteria"). In permit applications for appropriations of 10,000 acre feet/year or more or 15 cfs or more:

(1) a determination that the proposed appropriation is "reasonable" based on the following considerations:

- (a) existing and future demands for water;
- (b) anticipated benefits to the applicant and state;
- (c) effects on the quantity and quality of water;
- (d) possibility of saline seep; and
- (e) probable, significant adverse environmental impacts; and

(2) for consumptive diversions in these amounts, approval of the Legislature.

These provisions are scheduled to expire on July 1, 1985; and the old version of section 85-2-311 is scheduled to revive. The committee, however, has received favorable public comment concerning the temporary provisions of MCA § 85-2-311. In general, the committee believes such provisions can safeguard many of the state's concerns about the export of water and coal slurry pipelines and should be re-enacted.

Additionally, however, the committee believes that several provisions drawn from New Mexico (and that have been approved by the federal district court there), if coupled to Montana's statute, could significantly protect Montana's valid interest when proposals are made to move water interstate. Specifically, proposals for the out-of-state movement of water would have to be evaluated against the following additional criteria:

- (1) whether there are water shortages in Montana;
- (2) whether water subject to the application could feasibly be transported to alleviate shortages in Montana;
- (3) the sources of water available to the applicant in the state of destination; and
- (4) the demand being placed on the applicant's sources and supply in the state of destination.

Acting upon the recommendation of DNRC, the committee believes the water quantity necessary to trigger application of the public interest criteria should be reduced to 4000 acre feet/year or more and 5.5 cfs or more. This reduction would not be onerous to applicants as only 56 out of more than 8,000 permit applications over the last several years were of this magnitude.

At present, the protective public interest criteria do not apply to change of use applications for existing water rights. Thus, existing water rights might be transferred to another use although, under the public interest criteria, water could not be appropriated for such a use. In order to ensure that the public interest criteria apply across

the board, the committee recommends their application to change of use applications of 4,000 acre feet/year or more and 5.5 cfs or more.

Proposed language:

Section 2. Section 85-2-311, MCA, which is scheduled by law to revive on July 1, 1985, is amended and is affirmatively reenacted in its amended form to read as follows:

"Section 85-2-311. Criteria for issuance of permit.

(1) ~~{The department shall issue a permit if}~~ Except as provided in subsections (2), (3), and (4), the department shall issue a permit if the applicant proves by substantial credible evidence that the following criteria are met:

~~{(1)}~~ (a) there are unappropriated waters in the source of supply:

~~{(a)}~~ (i) at times when the water can be put to the use proposed by the applicant;

~~{(b)}~~ (ii) in the amount the applicant seeks to appropriate;

~~{(c)}~~ (iii) throughout the period during which the applicant seeks to appropriate, the amount requested is available;

~~{(2)}~~ (b) the water rights of a prior appropriator will not be adversely affected;

~~{(3)}~~ (c) the proposed means of diversion, construction, and operation of the appropriation work are adequate;

~~{(4)}~~ (d) the proposed use of water is a beneficial use;

~~{(5)}~~ (e) the proposed use will not interfere unreasonably with other planned uses or developments for which a permit has been issued [or for which water has been reserved].*

* Contingent on final wording of reservation system.

~~[(6) an applicant for an appropriation of 10,000 acre-feet a year or more and 15 cubic feet per second or more proves by clear and convincing evidence that the rights of a prior appropriator will not be adversely affected;]~~

~~[(7) except as provided in subsection (6), the applicant proves by substantial credible evidence the criteria listed in subsections (1) through (5).]~~

(2) The department may not issue a permit for an appropriation of 4000 or more acre-feet of water a year and 5.5 or more cubic feet per second of water unless the applicant proves by clear and convincing evidence and the department finds on the record that:

(a) the criteria in subsection (1) are met;

(b) the rights of a prior appropriator will not be adversely affected;

(c) the proposed appropriation is a reasonable use. Such a finding shall be based on a consideration of the following:

(i) the existing demands on the state water supply, as well as projected demands of water for future beneficial purposes, including municipal water supplies, irrigation systems, and minimum streamflows for the protection of existing water rights and aquatic life;

(ii) the benefits to the applicant and the state;

(iii) the economic feasibility of the project;

(iv) the effects on the quantity, quality, and potability of water for existing uses in the source of supply;

(v) the availability of low-quality water for the use sought;

(vi) the effects on private property rights by any creation of or contribution to saline seep; and

(vii) the probable significant adverse environmental impacts of the proposed use of water as determined by the department pursuant to Title 75, chapter 1, or Title 75, chapter 20.

(3) The department may not issue a permit for a diversion for a consumptive use of 4000 or more acre-feet of water a year and 5.5 or more cubic feet per second of water unless:

(a) the applicant proves by clear and convincing evidence and the department finds on the record that the criteria in subsections (1) and (2) are met; and

[(b) the department then petitions the legislature and the legislature affirms the findings of the department based on the record.] *

(4) (a) The state of Montana has long recognized the importance of the conservation of its public waters and the necessity to maintain adequate water supplies for the state's water requirements. Although the State of Montana also recognizes that, under appropriate conditions, the out-of-state transportation and use of its public waters are not in conflict with the public welfare of its citizens or the conservation of its waters, the following criteria must be met before that use may occur:

(b) The department may not issue [and, where applicable, the legislature may not approve,] * a permit for the appropriation of

* Does the committee desire to retain the requirement of legislative approval?

water for withdrawal and transportation for use outside the state unless the applicant proves by clear and convincing evidence and the department [and, where applicable, the legislature,]* find[s] on the record that:

(i) depending on the size of the diversion, the applicable criteria and procedures of subsections (1), (2), or (3) are met;

(ii) the proposed out-of-state use of water is not contrary to the conservation of water within Montana; and

(iii) the proposed out-of-state use of water is not otherwise detrimental to the public welfare of the citizens of Montana.

(c) In determining whether the applicant has proved by clear and convincing evidence that the requirements of subsections (4) (b) (ii) and (4) (b) (iii) are met, the department and, where applicable, the legislature shall consider, but not be limited to the following factors:

(i) whether there are water shortages within the state of Montana;

(ii) whether the water that is the subject of the application could feasibly be transported to alleviate water shortages within the state of Montana;

(iii) the supply and sources of water available to the applicant in the state where the applicant intends to use the water; and

(iv) the demands placed on the applicant's supply in the state where the applicant intends to use the water.

(d) By applying for a permit to withdraw and transport water for use outside the state, the applicant shall submit to and comply

with the laws of the state of Montana governing the appropriation and use of water.

(5) An appropriation, diversion, impoundment, restraint, or attempted appropriation, diversion, impoundment, use, or restraint contrary to the provisions of this section is invalid. No officer, agent, agency, or employee of the state may knowingly permit, aid, or assist in any manner such unauthorized appropriation, diversion, impoundment, or other restraint. No person or corporation may, directly or indirectly, personally or through an agent, officer, or employee, attempt to appropriate, divert, impound, or otherwise restrain or control waters within the boundaries of this state except in accordance with this section.

Section 3. Section 85-2-102, MCA, is amended to read as follows:

85-2-102. Definitions. Unless the context requires otherwise, in this chapter the following definitions apply:

(1) "Appropriate" means to divert, impound, or withdraw (including by stock for stock water) a quantity of water or, in the case of a public agency, to reserve water in accordance with 85-2-316.

(2) "Beneficial use", unless otherwise provided, means a use of water for the benefit of the appropriator, other persons, or the public, including but not limited to agricultural (including stock water), domestic, fish and wildlife, industrial, irrigation, mining, municipal, power, and recreational uses.

(3) "Board" means the board of natural resources and conservation provided for in 2-15-3302.

(4) "Certificate" means a certificate of water right issued by the department.

(5) "Change in appropriation right" means to change the place of diversion, change the place of use, change the purpose of use, change the place of storage, sever all or any part of an appropriation right from the land to which it is appurtenant, sell an appropriation right for other purposes or to other lands, or make an appropriation right appurtenant to other lands.

[renumber subsequent subsections.]

Section 85-2-102 (cont.)

(5) "Declaration" means the declaration of an existing right filed with the department under section 8, Chapter 452, Laws of 1973.

(6) "Department" means the department of natural resources and conservation provided for in Title 2, chapter 15, part 33.

(7) "Existing right" means a right to the use of water which would be protected under the law as it existed prior to July 1, 1973.

(8) "Groundwater" means any water beneath the land surface or beneath the bed of a stream, lake, reservoir, or other body of surface water, and which is not a part of that surface water.

(9) "Permit" means the permit to appropriate issued by the department under 85-2-301 through 85-2-303 and 85-2-306 through 85-2-314.

(10) "Person" means an individual, association, partnership, corporation, state agency, political subdivision, the United States or any agency thereof, or any other entity.

(11) "Political subdivision" means any county, incorporated city or town, public corporation, or district created pursuant to state law or other public body of the state empowered to appropriate water but not a private corporation, association, or group.

(12) "Slurry" means a mixture of water and insoluble material.

(13) "Waste" means the unreasonable loss of water through the design or negligent operation of an appropriation or water distribution facility or the application of water to anything but a beneficial use.

(14) "Water" means all water of the state, surface and subsurface, regardless of its character or manner of occurrence, including but not limited to geothermal water, diffuse surface water, and sewage effluent.

(15) "Water division" means a drainage basin as defined in 3-7-102.

(16) "Water judge" means a judge as provided for in Title 3, chapter 7.

(17) "Water master" means a master as provided for in Title 3, chapter 7.

(18) "Well" means any artificial opening or excavation in the ground, however made, by which groundwater is sought or can be obtained or through which it flows under natural pressures or is artificially withdrawn.

→ strike existing section; insert language on page 11

85-2-402. Changes in appropriation rights. (1) An appropriator may not change the place of diversion, place of use, purpose of use, or place of storage except as permitted under this section and approved by the department.

(2) The department shall approve the proposed change if it determines that the proposed change will not adversely affect the rights of other persons. If the department determines that the proposed change might adversely affect the rights of other persons, notice of the proposed change shall be given in accordance with 85-2-307. If the department determines that an objection filed by a person whose rights may be affected states a valid objection to the proposed change, the department shall hold a hearing thereon prior to its approval or denial of the proposed change. Objections shall meet the requirements of 85-2-308(2), and hearings shall be held in accordance with 85-2-309.

(3) An appropriator of more than 15 cubic feet per second may not change the purpose of use of an appropriation right from an agricultural or irrigation use to an industrial use.

(4) The department may approve a change subject to such terms, conditions, restrictions, and limitations it considers necessary to protect the rights of other appropriators, including limitations on the time for completion of the change.

(5) If a change is not completed as approved by the department or if the terms, conditions, restrictions, and limitations of the change approval are not complied with, the department may, after notice and opportunity for hearing, require the appropriator to show cause why the change approval should not be modified or revoked. If the appropriator fails to show sufficient cause, the department may modify or revoke the change approval.

(6) Without obtaining prior approval from the department, an appropriator may not sever all or any part of an appropriation right from the land to which it is appurtenant, sell the appropriation right for other purposes or to other lands, or make the appropriation right appurtenant to other lands. The department shall approve the proposed change if it determines that the proposed change will not adversely affect the water rights of other persons. If the department determines that the proposed change might adversely affect the water rights of other persons, notice of the proposed change must be given in accordance with 85-2-307. If the department then determines that an objection filed by a person whose water rights may be affected states a valid objection to the proposed change, the department shall hold a hearing thereon prior to its approval or denial of the proposed change. Objections must meet the requirements of 85-2-308, and hearings must be held in accordance with 85-2-309.

(7) The original of a change approval issued by the department must be sent to the applicant, and a duplicate must be kept in the office of the department in Helena.

(8) A person holding an issued permit or change approval that has not been perfected may change the place of diversion, place of use, purpose of use, or place of storage by filing an application for change pursuant to this section.

History: En. Sec. 28, Ch. 452, L. 1973; amd. Sec. 3, Ch. 238, L. 1974; amd. Sec. 1, Ch. 338, L. 1975; amd. Sec. 8, Ch. 416, L. 1977; R.C.M. 1947, 89-892; amd. Sec. 15, Ch. 448, L. 1983.

Compiler's Comments

1983 Amendment: In (3), after "agricultural" inserted "or irrigation"; inserted (6) through (8) ((6) was formerly 85-2-403(3)).

Cross-References

Due process, Art. II, sec. 17, Mont. Const.
Measurement of water, 85-2-103.
Penalties, 85-2-122.
Definitions, 85-2-602.

Section 4. Section 85-2-402, MCA, is amended to read as follows:

Section 85-2-402. Change in appropriation right. (1) An appropriator may not make a change in an appropriation right except as permitted under this section and with the approval of the department or, where applicable, of the legislature.

(2) Except as provided in subsections (3), (4), and (5), the department shall approve a change in appropriation right if the appropriator proves by substantial credible evidence that the following criteria are met:

(a) the water rights of a prior appropriator [or other person] * will not be adversely affected;

(b) the proposed means of diversion, construction, and operation of the appropriation work are adequate;

(c) the proposed use of water is a beneficial use;

(d) the proposed use will not interfere unreasonably with other planned uses or developments for which a permit has been issued [or for which water has been reserved]. **

(3) The department may not approve a change in appropriation right of an appropriation of 4000 or more acre feet of water a year and 5.5 or more cubic feet per second of water unless the appropriator proves by clear and convincing evidence and the department finds on the record that:

* Contingent on final wording of reservation section.

** Does the committee wish to retain the existing provision?

- (a) the criteria in subsection (2) are met;
- (b) the rights of a prior appropriator [or other person] * will not be adversely affected;
- (c) the proposed change is a reasonable use. such a finding shall be based on a consideration of the following:
 - (i) the existing demands on the state water supply, as well as projected demands of water for future beneficial purposes, including municipal water supplies, irrigation systems, and minimum streamflows for the protection of existing water rights and aquatic life;
 - (ii) the benefits to the applicant and the state;
 - (iii) the economic feasibility of the project;
 - (iv) the effects on the quantity, quality, and potability of water for existing uses in the source of supply;
 - (v) the availability of low-quality water for the use sought;
 - (vi) the effects on private property rights by any creation of or contribution to saline seep; and
 - (vii) the probable significant adverse environmental impacts of the proposed use of water as determined by the department pursuant to Title 75, chapter 1, or Title 75, chapter 20.

(4) The department may not issue a permit for a diversion for a consumptive use of 4000 or more acre feet of water a year and 5.5 or more cubic feet per second of water unless:

- (a) the applicant proves by clear and convincing evidence and the department finds that the criteria in subsections (1) and (2) are met;
- and

* Does the committee wish to retain this existing provision?

[(b) the department then petitions the legislature and the legislature approves the findings of the department based on the record.] *

(5) (a) The state of Montana has long recognized the importance of the conservation of its public waters and the necessity to maintain adequate water supplies for the state's water requirements. Although the state of Montana also recognizes that, under appropriate conditions, the out-of-state transportation and use of its public waters is not in conflict with the public welfare of its citizens or the conservation of its waters, the following criteria must be met before that use may occur:

(b) the department and, where applicable, the legislature, may not approve a change in appropriation right for the withdrawal and transportation of appropriated water for use outside the state unless the appropriator proves by clear and convincing evidence and the department and, where applicable, the legislature, find on the record that:

(i) depending on the size of the diversion, the applicable criteria and procedures of subsections (2), (3), or (4) are met;

(ii) the proposed out-of-state use of water is not contrary to the conservation of water within Montana; and

(iii) the proposed out-of-state use of water is not otherwise detrimental to the public welfare of the citizens of Montana.

* Does the committee desire a requirement of legislative approval?

(c) in determining whether the appropriator has proved by clear and convincing evidence that the requirements of subsection (4) (b) (ii) and (4) (b) (iii) are met, the department [and, where applicable, the legislature] * shall consider, but not be limited to the following factors:

(i) whether there are water shortages within the state of Montana;

(ii) whether the water that is the subject of the proposed change in appropriation might feasibly be transported to alleviate water shortages within the state of Montana;

(iii) the supply and sources of water available to the applicant in the state where the applicant intends to use the water; and

(iv) the demands placed on the applicant's supply in the state where the applicant intends to use the water.

(d) by applying for a permit to withdraw and transport water for use outside the state, the applicant shall submit to and comply with the laws of the state of Montana governing the appropriation and use of water.

(6) An appropriator of more than 15 cubic feet per second may not change the purpose of use of an appropriation right from an agricultural or navigation use to an industrial use.

(7) For any application for a change in appropriation right involving 4000 or more acre feet of water per year and 5.5 or more cubic feet per second of water, the department shall give notice of the proposed change

* Does the committee desire a requirement of legislative approval?

in accordance with 85-2-307 and shall hold a hearing in accordance with 85-2-309 prior to its approval or denial of the proposed change. The department may provide notice and may hold a hearing upon any other proposed change if it determines that such a change might adversely affect the rights of other persons.

(8) The department or legislature, where applicable, may approve a change subject to such terms, conditions, restrictions, and limitations it considers necessary to protect the rights of other persons, including limitations on the time for completion of the change.

(9) If a change is not completed as approved by the department [or legislature] * or if the terms, conditions, restrictions, and limitations of the change approved are not complied with, the department may, after notice and opportunity for hearing, require the appropriator to show cause why the change approved should not be modified or revoked. If the appropriator fails to show sufficient cause, the department may modify or revoke the change approved.

(10) The original of a change approved and issued by the department must be sent to the applicant, and a duplicate must be kept in the office of the department in Helena.

(11) A person holding an issued permit or change approval that has not been perfected must obtain approval of any change in appropriation by filing an application for change pursuant to this section.

* Contingent on a requirement of legislative approval.

(12) A change in appropriation right contrary to the provisions of this section is invalid. No officer, agent, agency, or employee of the state may knowingly permit, aid, or assist in any manner such unauthorized change in appropriation right. No person or corporation may, directly or indirectly, personally or through an agent, officer, or employee, attempt to change an appropriation right except in accordance with this section.

3. WATER FOR COAL SLURRY PURPOSES

Recommendations:

The committee recommends that Montana's ban on the use of water as a medium to transport coal in a pipeline be removed. The use of water in a coal slurry pipeline should be recognized as a beneficial use of water. This recommendation is expressly conditioned on the passage of other recommendations made by the committee to protect the state, its environment, and its citizens from the potential damage that can be caused by such pipelines.

Commentary:

Section 85-2-102, MCA, defines the beneficial use of water to mean a use of water for the benefit of the appropriator, other persons, or the public, including but not limited to agricultural (including stock water), domestic, fish and wildlife, industrial, irrigation, mining, municipal, power, and recreational uses. Also, MCA § 85-2-103 makes clear: "(1) the Legislature finds that the use of water for the slurry

transport of coal is detrimental to the conservation and protection of the water resources of the states; and (2) the use of water for the slurry transport of coal is not a beneficial use of water."

The coal slurry ban, as presently constituted, results in some potentially strange results. Surprisingly, it bans neither the transport of coal by pipeline nor the use of water in a pipeline. What it does ban is the mixing of the two substances in a pipeline.

A coal slurry pipeline can be built and operated in the state so long as the medium for transport is other than water (e.g., methane, liquid carbon dioxide). Also, water can be used as the medium in a slurry pipeline so long as the substance being transported is not coal (e.g., grain, other minerals). Even though the coal slurry ban has been justified on the basis of minimizing negative environmental impacts, the construction of a pipeline for the conveyance of coal (without water) or other substances (with or without water) is not subject to permitting under the state's Major Facility Siting Act or any other statewide regulatory scheme (except for possible requirement of an environmental impact statement under the Montana Environmental Policy Act).

The Sporhase case recognizes the legitimacy of state conservation measures "to regulate the use of water in times and places of shortage for the purpose of protecting the health of its citizens...." The questions for Montana, however, become (1) whether such a ban violates the equal protection clause of either the U.S. Constitution or the Montana Constitution; and (2) whether a ban against coal slurry

pipelines violates the "dormant" interstate commerce clause of the federal Constitution by impermissibly burdening commerce between the states.

Numerous experts have provided the committee with their views as to the constitutionality of the coal slurry ban. Their views have generally been mixed. Supporters of the ban have indicated that Montana has both a strong constitutional and statutory basis for the conservation of natural resources. They argue that coal slurry is a totally consumptive water use, unlike many industrial uses; that it requires continuous, large amounts of coal to operate; and that it has other environmental impacts in the construction and operation of the pipeline. The ban, therefore, represents a state policy whose purpose is to closely regulate the speed and intensity of coal development.

Critics of the statute argue that the coal slurry ban is irrational in relationship to its stated purposes and cannot be sustained. The ban does not conserve coal, as the mineral can be moved by other transportation modes or, even, by pipelines using a transport medium other than water. Nor does the ban conserve water; water can be used for all other forms of pipelines.

Critics of the statutory ban also argue that "coal slurry pipeline transportation systems, simply because of their size and economic scale, contemplate the interstate movement of coal to distant markets." As these pipelines generally use water as the medium of transport, a ban on the appropriation or use of any water, regardless of its quality, may unreasonably interfere with interstate commerce. Montana's interest in

protecting and conserving its waters can be pursued through other means having less impact on interstate commerce.

The committee is of the judgment that the constitutionality of the coal slurry ban could be sustained against an equal protection attack. The committee, however, agrees with the observation of Professor Albert Stone of the University of Montana School of Law: the constitutionality of the coal slurry ban under the interstate commerce clause is "a close question, too close to permit reliance upon the statute." The consequence of the state being wrong in terms of the ultimate defensibility of its ban are severe: the water could be appropriated without significant payment to the state, the pipeline could be constructed outside any significant state regulation (excepting the Montana Environmental Policy Act), and the state could be liable for the prevailing party's attorneys fees.

Proposed language:

Section 5. Section 85-2-101, MCA, is amended to read:

"85-2-102. Definitions. [Set forth entire section]

(2) "Beneficial use," unless otherwise provided, means a use of water for the benefit of the appropriator, other persons of the public, including but not limited to agricultural (including stock water), domestic, fish and wildlife, industrial, irrigation, mining, the transport medium in a pipeline, municipal, power, and recreational uses."

Section 6. Section 85-2-104, MCA, is repealed.

4. COVERAGE OF PIPELINES UNDER THE MAJOR FACILITY SITING ACT

Recommendation:

The committee recommends that the siting of all future pipelines exceeding 30 miles in length and 20 inches in diameter be covered by the provisions of the Major Facility Siting Act.

Commentary:

Montana's Major Facility Siting Act requires that a major facility (usually an energy-related facility) obtain a certificate of environmental compatibility and public need from the Board of Natural Resources and Conservation prior to construction. The certificate is considered by the board only after an extensive application has been submitted with an opportunity for federal, state, and local governmental agencies, as well as the general public, to comment on it. The application also receives a thorough evaluation from DNRC, which forwards its recommendations to the board.

Coverage by the MFSA results in a comprehensive review by the board of numerous environmental and economic considerations. At present, there is limited coverage of pipelines under the Siting Act. Under current law, if pipelines run to or from a large energy facility located in or out of Montana, the pipeline and its associated facilities must be constructed in accordance to a certificate issued by the board. This application is very limited however in that pipeline developers could easily tailor new coal slurry pipelines to circumvent this limited coverage.

Coverage of certain large pipeline projects under the public need provision of the Siting Act would appear justified on the same basis

that other large projects are under the Act: if the public is to invest in public works and services to support the construction and operation of such projects (as well as to mitigate their negative impacts), then the taxpayers should be afforded an independent review of the feasibility of the project.

The committee also feels that environmental compatibility is another reason for which to place large pipelines not running to major energy facilities under the Siting Act. Because the committee is concerned with minimizing environmental damage along the construction route, all pipelines in excess of a certain length and width should be covered.

Proposed language:

(See proposed language on pages 21a et. seq.)

B. STATE WATER LEASING PROGRAM

5. LIMITED WATER LEASING PROGRAM

Recommendation:

The committee recommends establishing a limited state water leasing program involving a total of 50,000 acre feet of impounded water. A lease from the state would be required to obtain water in any amount for any industrial purpose, [in any amount for interbasin transfer], * or

* Tentative recommendation of Representative Kemmis.

Section 7. Section 75-20-104, MCA, is amended to read:

"75-20-104. Definitions. In this chapter, unless the context requires otherwise, the following definitions apply:

(1) "Addition thereto" means the installation of new machinery and equipment which would significantly change the conditions under which the facility is operated.

(2) "Application" means an application for a certificate submitted in accordance with this chapter and the rules adopted hereunder.

(3) "Associated facilities" includes but is not limited to transportation links of any kind, aqueducts, diversion dams, transmission substations, storage ponds, reservoirs, and any other device or equipment associated with the production or delivery of the energy form or product produced by a facility, except that the term does not include a facility.

(4) "Board" means the board of natural resources and conservation provided for in 2-15-3302.

(5) "Board of health" means the board of health and environmental sciences provided for in 2-15-2104.

(6) "Certificate" means the certificate of environmental compatibility and public need issued by the board under this chapter that is required for the construction or operation of a facility.

(7) "Commence to construct" means:

(a) any clearing of land, excavation, construction, or other action that would affect the environment of the site or route of a facility but does not mean changes needed for temporary use of sites or routes for nonutility purposes or uses in securing geological data, including necessary borings to ascertain foundation conditions;

(b) the fracturing of underground formations by any means if such activity is related to the possible future development of a gasification facility or a facility employing geothermal resources but does not include the

gathering of geological data by boring of test holes or other underground exploration, investigation, or experimentation;

(c) the commencement of eminent domain proceedings under Title 70, chapter 30, for land or rights-of-way upon or over which a facility may be constructed;

(d) the relocation or upgrading of an existing facility defined by (b) or (c) of subsection (10), including upgrading to a design capacity covered by subsection (10)(b), except that the term does not include normal maintenance or repair of an existing facility.

(8) "Department" means the department of natural resources and conservation provided for in Title 2, chapter 15, part 33.

(9) "Department of health" means the department of health and environmental sciences provided for in Title 2, chapter 15, part 21.

(10) "Facility" means:

(a) except for crude oil and natural gas refineries, and facilities and associated facilities designed for or capable of producing, gathering, processing, transmitting, transporting, or distributing crude oil or natural gas, and those facilities subject to The Montana Strip and Underground Mine Reclamation Act, each plant, unit, or other facility and associated facilities designed for or capable of:

(i) generating 50 megawatts of electricity or more or any addition thereto (except pollution control facilities approved by the department of health and environmental sciences added to an existing plant) having an estimated cost in excess of \$10 million;

(ii) producing 25 million cubic feet or more of gas derived from coal per day or any addition thereto having an estimated cost in excess of \$10 million;

(iii) producing 25,000 barrels of liquid hydrocarbon products per day or more or any addition thereto having an estimated cost in excess of \$10 million;

(iv) enriching uranium minerals or any addition thereto having an estimated cost in excess of \$10 million; or

(v) utilizing or converting 500,000 tons of coal per year or more or any addition thereto having an estimated cost in excess of \$10 million;

(b) each electric transmission line and associated facilities of a design capacity of more than 69 kilovolts, except that the term does not include an electric transmission line and associated facilities of a design capacity of 230 kilovolts or less and 10 miles or less in length;

(no amendment) → (c) each pipeline and associated facilities designed for or capable of transporting gas (except for natural gas) or liquid hydrocarbon products from or to a facility located within or without this state of the size indicated in subsection (10)(a) of this section;

and ~~(d) each pipeline greater than 20 inches in diameter or 30 miles in length and associated facilities~~

regarding any use or geothermal resources, including the use of underground space in existence or to be created, for the creation, use, or conversion of energy, designed for or capable of producing geothermally derived power equivalent to 25 million Btu per hour or more or any addition thereto having an estimated cost in excess of \$750,000;

and (f) any underground in situ gasification of coal.

(11) "Person" means any individual, group, firm, partnership, corporation, cooperative, association, government subdivision, government agency, local government, or other organization or entity.

(12) "Transmission substation" means any structure, device, or equipment assemblage, commonly located and designed for voltage regulation, circuit protection, or switching necessary for the construction or operation of a proposed transmission line.

(13) "Utility" means any person engaged in any aspect of the production, storage, sale, delivery, or furnishing of heat, electricity, gas, hydrocarbon products, or energy in any form for ultimate public use."

Section 8.

Section 75-20-216, MCA, is amended to read:

"75-20-216. Study, evaluation, and report on proposed facility -- assistance by other agencies. (1) After receipt of an application, the department and department of health shall within 90 days notify the applicant in writing that:

(a) the application is in compliance and is accepted as complete; or

(b) the application is not in compliance and list the deficiencies therein; and upon correction of these deficiencies and resubmission by the applicant, the department and department of health shall within 30 days notify the applicant in writing that the application is in compliance and is accepted as complete.

(2) Upon receipt of an application complying with 75-20-211 through 75-20-215, and this section, the department shall commence an intensive study and evaluation of the proposed facility and its effects, considering all applicable criteria listed in 75-20-301 and 75-20-503 and the department of health shall commence a study to enable it or the board of health to issue a decision, opinion, order, certification, or permit as provided in subsection (3). The department and department of health shall use, to the extent they consider applicable, valid and useful existing studies and reports submitted by the applicant or compiled by a state or federal agency.

(3) The department of health shall within 1 year following the date of acceptance of an application and the board of health or department of health, if applicable, within an additional 6 months issue any decision, opinion, order, certification, or permit required under the laws administered by the department of health or the board of health and this chapter. The department of health and the board of health shall determine compliance with all standards, permit requirements, and implementation plans under their jurisdiction for the primary and reasonable alternate locations in their decision, opinion, order, certification, or permit. The decision, opinion, order, certification, or permit, with or without conditions, is conclusive on all matters that the department of health and board of health administer, and any of the criteria specified in subsections (2) through (7) of 75-20-503 that are a part of the determinations made under the laws administered by the department of health and the board of health. Although the decision, opinion, order, certification, or permit issued under this subsection is conclusive, the board retains authority to make the determination required under 75-20-301(2)(c). The decision, opinion, order, certification, or permit of the department of health or the board of health satisfies the review requirements by those agencies and shall be acceptable in lieu of an environmental impact statement under the Montana Environmental Policy Act. A copy of the decision, opinion, order, certification, or permit shall be served upon the department and the board and shall be utilized as part of their final site selection process. Prior to the issuance of a preliminary decision by the department of health and pursuant to rules adopted by the board of health, the department of health shall provide an opportunity for public review and comment.

(4) Within 22 months following acceptance of an application for a facility as defined in (a) and ~~(d)~~ (d) of 75-20-104(10) and for a facility as defined in (b) ~~and (e)~~ through (d) of 75-20-104(10) which is more than 30 miles in length and within 1 year for a facility as defined in (b) ~~and (e)~~ through (d) of 75-20-104(10) which is 30 miles or less in length, the department shall make a report to the board which shall contain the department's studies, evaluations, recommendations, other pertinent documents resulting from its study and evaluation, and an environmental impact statement or analysis prepared pursuant to the Montana Environmental Policy Act, if any. If the application is for a combination of two or more facilities, the department shall make its report to the board within the greater of the lengths of time provided for in this subsection for either of the facilities.

(5) The departments of highways; commerce; fish, wildlife, and parks; state lands; revenue; and public service regulation shall report to the department information relating to the impact of the proposed site on each department's area of expertise. The report may include opinions as to the advisability of granting, denying, or modifying the certificate. The department shall allocate funds obtained from filing fees to the departments making reports to reimburse them for the costs of compiling information and issuing the required report."

Section 9.

Section 75-20-218, MCA, is amended to read:

"75-20-218. Hearing date -- location -- department to act as staff -- hearings to be held jointly. (1) Upon receipt of the department's report submitted under 75-20-216, the board shall set a date for a hearing to begin not more than 120 days after the receipt. ~~Except for those hearings involving applications submitted for facilities as defined in (b) and (e) of 75-20-104(10), certification~~ Certification hearings shall be conducted by the board in the county seat of Lewis and Clark County or the county in which the facility or the greater portion thereof is to be located.

(2) Except as provided in 75-20-221(2), the department shall act as the staff for the board throughout the decisionmaking process and the board may request the department to present testimony or cross-examine witnesses as the board considers necessary and appropriate.

(3) At the request of the applicant, the department of health and the board of health shall hold any required permit hearings required under laws administered by those agencies in conjunction with the board certification hearing. In such a conjunctive hearing the time periods established for reviewing an application and for issuing a decision on certification of a proposed facility under this chapter supersede the time periods specified in other laws administered by the department of health and the board of health."

Section 10.

Section 75-20-303, MCA, is amended to read:

"75-20-303. Opinion issued with decision -- contents.

(1) In rendering a decision on an application for a certificate, the board shall issue an opinion stating its reasons for the action taken.

(2) If the board has found that any regional or local law or regulation which would be otherwise applicable is unreasonably restrictive pursuant to 75-20-301(2)(f), it shall state in its opinion the reasons therefor.

(3) Any certificate issued by the board shall include the following:

(a) an environmental evaluation statement related to the facility being certified. The statement shall include but not be limited to analysis of the following information:

(i) the environmental impact of the proposed facility;

(ii) any adverse environmental effects which cannot be avoided by issuance of the certificate;

(iii) problems and objections raised by other federal and state agencies and interested groups;

(iv) alternatives to the proposed facility;

(v) a plan for monitoring environmental effects of the proposed facility; and

(vi) a time limit as provided in subsection (4), during which construction of the facility must be completed;

(b) a statement signed by the applicant showing agreement to comply with the requirements of this chapter and the conditions of the certificate.

(4) The board shall issue as part of the certificate the following time limits during which construction of a facility must be completed:

(a) For a facility as defined in (b) ~~1~~(c) ~~1~~ or (c) ~~1~~(d) of 75-20-104~~(7)~~(10) that is more than 30 miles in length, the time limit is 10 years.

(b) For a facility as defined in (b) ~~1~~(c) ~~1~~ or (c) ~~1~~(d) of 75-20-104~~(7)~~(10) that is 30 miles or less in length, the time limit is 5 years.

(c) The time limit shall be extended for periods of 2 years each upon a showing by the applicant to the board that a good faith effort is being undertaken to complete construction. Under this subsection, a good faith effort to complete construction includes the process of acquiring any necessary state or federal permit or certificate for the facility and the process of judicial review of any such permit or certificate.

(5) The provisions of subsection (4) apply to any facility for which a certificate has not been issued or for which construction is yet to be commenced."

Section 11.

Section 75-20-304, MCA, is amended to read:

"75-20-304. Waiver of provisions of certification proceedings. (1) The board may waive compliance with any of the provisions of 75-20-216 through 75-20-222, 75-20-501, and this part if the applicant makes a clear and convincing showing to the board at a public hearing that an immediate, urgent need for a facility exists and that the applicant did not have knowledge that the need for the facility existed sufficiently in advance to fully comply with the provisions of 75-20-216 through 75-20-222, 75-20-501, and this part.

(2) The board may waive compliance with any of the provisions of this chapter upon receipt of notice by a utility or person subject to this chapter that a facility or associated facility has been damaged or destroyed as a result of fire, flood, or other natural disaster or as the result of insurrection, war, or other civil disorder and there exists an immediate need for construction of a new facility or associated facility or the relocation of a previously existing facility or associated facility in order to promote the public welfare.

(3) The board shall waive compliance with the requirements of subsections (2)(c), (3)(b), and (3)(c) of 75-20-301 and 75-20-501(5) and the requirements of subsections (1)(a)(iv) and (v) of 75-20-211, 75-20-216(3), and 75-20-303(3)(a)(iv) relating to consideration of alternative sites if the applicant makes a clear and convincing showing to the board at a public hearing that:

(a) a proposed facility will be constructed in a county where a single employer within the county has permanently curtailed or ceased operations causing a loss of 250 or more permanent jobs within 2 years at the employer's operations within the preceding 10-year period;

(b) the county and municipal governing bodies in whose jurisdiction the facility is proposed to be located support by resolution such a waiver;

Section 12.

Section 75-20-1202, MCA, is amended to read:

"75-20-1202. Definitions. As used in this part and 75-20-201 through 75-20-203, the following definitions apply:

(1) (a) "Nuclear facility" means each plant, unit, or other facility designed for, or capable of,

(i) generating 50 megawatts of electricity or more by means of nuclear fission,

(ii) converting, enriching, fabricating, or reprocessing uranium minerals or nuclear fuels, or

(iii) storing or disposing of radioactive wastes or materials from a nuclear facility;

(b) "nuclear facility" does not include any small-scale facility used solely for educational, research, or medical purposes not connected with the commercial generation of energy.

(2) "Facility," as defined in 75-20-104~~(7)~~(10) is further defined to include any nuclear facility as defined in subsection (1)(a) of this section."

for an amount in excess of 4000 acre feet/year or 5.5 cfs for any other consumptive beneficial use. All such leases would be reviewed under the public interest criteria of MCA § 85-2-311; and an environmental impact statement would be required in most instances. Lease terms would be 40 years or less.

Commentary:

The details of the limited water leasing program recommended by the committee are as follows. Administered by DNRC, water would be leased from the state under two [three] * prospective circumstances:

(a) whenever water in any amount is being sought for industrial purposes;

[(b) whenever water in any amount is being sought for interbasin transport; or] *

(c) whenever water in excess of 4000 acre feet/year or 5.5 cfs is being sought for any other consumptive beneficial use.

Only a total of 50,000 acre feet/year of water could be leased under this program for the foregoing three purposes. Upon the effective date of this proposed legislation, 50,000 acre feet/year of water would be appropriated in the name of the State of Montana and a certificate issued to DNRC. In the event lease applications exceeded this amount, DNRC would have to return to the Legislature for additional leasing authority.

* Tentative recommendation of Representative Kemmis.

The source of water for the leasing program would be impounded water from any state or federal reservoir within Montana. Water could not be leased from a reservoir in a basin for which a pending or final decree under the general stream adjudication program had not been entered. This moratorium would not apply to Fort Peck, for which the state has an existing water purchase agreement with the U.S. Bureau of Reclamation, and Tiber, Canyon Ferry, and Yellowstone reservoirs, once memoranda of agreement have been executed. The committee strongly urges DNRC negotiate (or renegotiate, in the case of Fort Peck) memoranda of agreement covering all federal reservoirs within the state and water purchases for all types of uses (not just industrial).

Water would be leased through bilateral negotiations. Upon receipt of an application to lease water, DNRC would evaluate the proposal with reference to the public interest criteria of MCA § 85-2-311(2) [as proposed in this report], regardless of the amount of water involved. For proposals involving less than 4000 acre feet/year and less than 5.5 cfs, however, an environmental impact statement would be required only in the discretion of DNRC under its MEPA rules.

Water would be leased for terms not to exceed 40 years. There would be a mandatory set aside of 25 percent of project capacity for municipal and rural purposes (upon payment by the municipal or rural government entity of the costs of tie-in). Any other terms or conditions would be determined by DNRC through negotiations.

Proposed language:

Section 13. Section 85-2-102, MCA, is amended to read:

85-2-102. Definitions. Unless the content requires otherwise, in this chapter the following definitions apply:

(2) 'Beneficial use,' unless otherwise provided, means a use of water for the benefit of the appropriator, other persons, or the public, including but not limited to agricultural (including stock water), domestic, fish and wildlife, industrial, irrigation, mining, municipal, power, and recreational uses. 'Beneficial use' also means water approved by the department for the state water leasing program under [section ----] and water leased under a valid lease issued by the department under that section.

Section 14. Section 85-2-301, MCA, is amended to read:

85-2-301. Right to appropriate. After July 1, 1973, a person may not appropriate water except as provided in this chapter. A person may only appropriate water for a beneficial use. Only the department may appropriate water for industrial [or mining?] purposes (in any amount), for transport to and use in another water shed (in any amount), or in an amount in excess of 4000 acre feet per year or 5.5 cubic feet per second. Water for these purposes or in these amounts may be leased from the department by any person under the provisions of [section ---]. A right to appropriate water may not be acquired by any other method, including by adverse use, adverse possession, prescription, or estoppel. The method prescribed by this chapter is exclusive."

Section 15. Section 85-1-204. Department powers over state water. (1)

The department, subject to the provisions of [section ----] and with the approval of the board, may sell, lease, and otherwise dispose of all waters which may be impounded under this chapter, and the water

may be sold for the purpose of irrigation, development of power, watering of stock, or any other purpose. To the extent that it may be necessary to carry out this chapter and subject to a compliance with the other provisions of this chapter, the department has full control of all the water of the state not under the exclusive control of the United States and not vested in private ownership, and it shall take such steps as may be necessary to appropriate and conserve the same for the use of the people. The authority of the department conferred by this chapter extends and applies to rights to the natural flow of the waters of this state which it may acquire, with the approval of the board, by condemnation, purchase, exchange, appropriation, or agreement.

(2) For the purpose of regulating the diversion of those waters, the department may enter upon the means and place of use of all appropriators for making surveys of respective rights and seasonal needs.

(3) The department may take into consideration the decrees of the courts of this state having jurisdiction which purport to adjudicate the waters of a stream or its tributaries, and a fair, reasonable, and equitable reconciliation shall be made between the claimants asserting rights under different decrees and between decreed rights and asserted rights of appropriation not adjudicated by any court.

(4) The department, at its discretion, may hold hearings relating to the rights of respective claimants after first giving such notice as it considers appropriate and make findings of the date and quantity of appropriation and use of all claimants which the department will recognize and observe in diverting the waters which it owns. The department may police and distribute to the owner of the recognized appropriation the waters due him upon request and under terms agreed upon.

(5) The department, when engaged in controlling and dividing the natural flow of a stream under the authority granted by this chapter, is exercising a police power of the state, and water commissioners appointed by any court may not deprive the department of any of the waters owned or administered under agreement with respective owners. The owner of a prior right contending that the department is not recognizing and respecting the appropriation may resort to a court for the purpose of determining whether or not the rights of the claimant have been invaded, and the department shall observe the terms of the final decree.

(6) When the department impounds or acquires the right of appropriation of the waters of a stream it may divert or authorize the diversion at any point on the stream or any portion thereof when it is done without injury to a prior appropriator.

NEW SECTION. Section 16. Water leasing program. (1) There is a water leasing program administered in behalf of the state by the department.

(2) The department is authorized and divested to select and appropriate in its own name 50,000 acre feet of previously unappropriated water for leasing under the provisions of this section. The water may be selected from Fort Peck Reservoir so long as an agreement between the department and the federal government concerning acquisition of water from the reservoir remains in effect; from Tiber, Canyon Ferry, or Yellowtail reservoirs in the event an agreement between the department and the federal government concerning acquisition of water from one or more of those reservoirs; or from any other state or federal reservoirs in a basin where either a preliminary decree under 85-2-231 or a final decree under 85-2-234 has been entered.

(3) Water may be leased by the department to any person for any beneficial use. The term of any such lease shall not exceed 40 years.

(4) Upon application by any person to lease water, the department shall make an initial determination of whether it is desirable for the department to lease water to the applicant. In making this determination, the department shall first require the completion of an environmental impact statement under the provisions of Title 75, chapter 1, for applications for 4000 acre feet/year or more and 5.5 cubic feet/second or more of water and for any application the department in its discretion may require. Such a determination of desirability shall be made solely on the following considerations:

(a) whether there is sufficient water available under the water leasing program; and

(b) whether the criteria, except as to legislative approval, set forth in section 85-2-311 have been satisfied.

(5) Upon determination that a leasing proposal is desirable, the department shall engage in negotiations with the applicant to conclude a mutually satisfactory lease agreement. The department shall require commercially reasonable terms and conditions for any lease agreement. In appropriate instances, the department may require that up to 25 percent of the water to be leased be made available to government entities for domestic or municipal purposes upon payment of such entity of all costs of tapping into and removing water from applicant's project.

(6) The lease of water or the use of water under a lease does not constitute a permit as provided in 85-2-102 and does not establish a right to appropriate water within the meaning of Title 85, chapter 2, part 3.

(7) The proceeds from the lease of water under this program shall be distributed as follows: [COMMITTEE TO DISCUSS]

6. USE OF WATER LEASING PROCEEDS

Recommendation:

To be discussed by the committee on December 3.

Commentary:

Proposed language:

NEW SECTION. Section 17. Use of water leasing proceeds. The proceeds from the lease of water under the water leasing program shall be distributed as follows:

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7. ACQUISITION OF WATER FROM FEDERAL RESERVOIRS

Recommendation:

The committee recommends that the Department of Natural Resources and Conservation be granted continued authority to acquire water from all federal reservoirs in the state (as is now the policy under the temporary two-year modification to this section). The committee recommends that the department's authority be clarified to allow acquisition for "any beneficial use."

The existing agreement with the Bureau of Reclamation for the state's acquisition of water from Fort Peck limits the acquisition to industrial water. Under the current agreement the bureau could sell large amounts of water for nonindustrial purposes and avoid sharing revenues with the state. The committee strongly urges that this agreement be renegotiated, and all future agreements be negotiated to cover water for any beneficial use.

Proposed language:

Section 18. Section 85-1-205, MCA, which is scheduled by law to expire on July 1, 1985, is amended and is affirmatively reenacted to read as follows:

"Section 85-1-205. Acquisition of water in federal reservoirs.

(1) The department may acquire water or water storage by purchase option or agreement with the federal government from any federal reservoir for the purposes of sale, rent, or distribution for any beneficial use. In such cases [CONTINUE WITH SECTION]"

C. MAXIMIZING MONTANA'S FAIR SHARE OF MISSOURI RIVER BASIN WATER

"GETTING MONTANA'S HOUSE IN ORDER"

8. GENERAL STREAM ADJUDICATION

Recommendation:

The committee urges an expeditious and accurate completion of the statewide water adjudication process. The committee recommends that the Legislature support any justified funding request from the water courts.

Commentary:

The adjudication of pre-1973 water rights presently underway in the five water courts of the state is essential to protect future water needs in Montana. To date, three final decrees involving 10,715 claims have been entered; and 26 sub-basins, involving 46,726 claims, are predicted to be covered by preliminary decrees by the end of 1984.

Chief Water Judge W. W. Lessley has indicated that the adjudication process for the 200,000 plus claims that are now on file will be completed by 1990. To ensure the process is completed on schedule the Legislature should support the court's funding request.

9. INDIAN AND FEDERAL RESERVED WATER RIGHTS

Recommendation:

The committee recommends support for legislation that would provide a two year extension of the Reserved Water Rights Compact Commission in its efforts to negotiate federal and Indian reserved water rights.

The committee recommends that adequate funds be appropriated for the Reserved Water Rights Compact Commission to accomplish its goals.

Commentary:

The committee recognizes an urgency to conclude the equitable adjudication of Indian and federal reserved water rights. Outstanding reserved water right claims hamper the ability of the state to complete the statewide adjudication of water rights, interfere with water resource planning, and limit the state's ability to prepare for interstate apportionment of the Missouri River.

In the event the Legislature chooses to renew the charter of the commission, the level of resources dedicated to the compact commission should be examined. The Legislature might encourage the development of joint water project proposals with Indian tribes as a means to satisfy both Indian claims and state needs. Also, the Legislature might statutorily provide some criteria upon which compacts should be negotiated (e.g., range of water available, off-reservation uses, authority of Indian tribes to market water).

10. WATER RESOURCES DATA MANAGEMENT SYSTEM

Recommendation:

The committee recommends the establishment within DNRC of a centralized water resources data management system. The system would make readily accessible to the state's policymakers necessary information on the state's water resources, existing and projected uses, and existing and projected demands. The committee also recommends that \$50,000 per year for each of the next five years be allocated for the development of such a system.

Commentary:

In the 1982 Trelease study done for DNRC, the authors found that:

"In order to make their specific decisions, each agency collects the necessary data which are stored in separate agency files and, in many cases, are difficult to relocate. At the present time much of the water resource data is fragmented, neither indexed nor inventoried, not recorded in a standard format, and most importantly, not readily accessible to those who need the information for making management decisions."

The study also reported that the state does not presently maintain data as to amount of water actually used by water claimants. Thus, the existing method reports maximum legal use rather than actual diversion.

The Trelease study suggested that centralized information is needed on the state's water resources, existing uses, and the potential for future development. As previously stressed in the present report, "the identification of existing uses and future development potential is

Montana's only line of defense to obtain a fair share in any interstate allocation." Specifically, the Trelease report suggested a centralized water resources data system should have five objectives: (1) to inventory and index the location of all pertinent water resource data; (2) to assess the accuracy and completeness of existing data (remove all duplication); (3) to standardize data collection procedures; (4) to develop and implement a centralized data system that is easily accessible in a useable format to all users; and (5) to establish a continuous and integrated water resource data collection and management program. To meet this need, the Trelease report recommended the allocation of \$50,000 per year for the next five years for the development of such a centralized water resources data system.

Such a data system is important both to current Montana users and potential users, as well as to the state as it develops interstate water policy. The committee is concerned, however, about relying entirely on one data system to report on present and future supply and demand. The Legislature may well wish for its Water Policy Committee, recommendation 14, to undertake verification of water resource data maintained by DNRC. The purpose of the verification would not be to duplicate functions already performed by the agency but to challenge or confirm the methodological assumptions and to systematically spot-check the data. The function would go a long way in raising the level of confidence of Montana policymakers, including the Legislature and the department itself, in the water resource data that they utilize in determining their long-term water policy.

Proposed language:

Section 19. Section 85-2-112, MCA, is amended to read:

"85-2-112. Department duties. The department shall:

(1) enforce and administer this chapter and rules adopted by the board under 85-2-112, subject to the powers and duties of the supreme court under 3-7-204;

(2) prescribe procedures, forms, and requirements for applications, permits, certificates, claims of existing rights, and proceedings under this chapter and prescribe the information to be contained in any application, claim of existing right, or other document to be filed with the department under this chapter not inconsistent with the requirements of this chapter;

(3) establish and maintain a centralized and efficient water resources data management system sufficient to make information on the state's water resources, existing and potential uses, and existing and potential demand available and readily accessible in a useable format to state agencies and other interested persons;

[renumber subsequent sections.]

11. WATER RESERVATION SYSTEM

Recommendation:

The committee recommends an aggressive use of the water reservation system as provided in MCA § 85-2-316 to plan for and set aside water for the anticipated future needs of the state. To accomplish the reservation of waters, the committee further recommends the following:

(1) The Legislature should encourage the water reservation process by appropriating sufficient funds for technical and financial assistance to the appropriate state agencies and other political subdivisions that are authorized to reserve water.

(2) The Legislature should appropriate funds to increase the monitoring and review of existing water reservations in the Yellowstone River Basin to ensure that progress is made in perfecting these reservations.

(3) The Legislature should mandate and fund an expedited reservation process for the Missouri River Basin.

Commentary:

Accurate predictions of future water needs are important both to water resource management within the state and in preparation for negotiations or litigation with other states. Such information is also essential in dealing with Congress concerning water project funding and other issues, such as a Congressional apportionment of the Missouri.

Montana's innovative water reservation system is a systematic means to identify future uses in a basin. While reservations operate like permits in that they are protected in most cases from subsequent appropriations within the state, they may not be recognized as inchoate permits in an interstate apportionment action. But to the extent the reservation process represents a well-conceived attempt by Montana to manage and plan for the necessary future uses of its water, established reservations should be persuasive to the courts and Congress.

Reservations have been completed in the Yellowstone River Basin but the committee recognizes an urgent need to proceed with the reservation process on other major river basins. Because of downstream states' interests in the Missouri River Basin, the committee has recommended special attention be given to water reservations in this basin.

There are uncertainties regarding some water rights in the Upper Missouri River Basin but the committee urges that the planning and technical efforts required for water reservations be initiated.

The successful development of water reservations in the Missouri River Basin will require sufficient financing and technical expertise to assist state and local government entities in initiating and completing the process.

The 1982 Trelease study done for the DNRC stated:

"It is critically important that the water reserved under the Yellowstone reservation process be developed within a reasonable time frame and that the reservants adhere to the schedule stipulated by the Board of Natural Resources and Conservation in the Reservation Order. This process must be able to withstand an equitable apportionment lawsuit among the Missouri Basin states. The Montana legislature realized this and allocated funds for administrative and technical assistance to the Yellowstone conservation districts in developing their reservations. The state should continue to closely monitor the development of these reservations to assure compliance with the Board reservation order."

The committee agrees with the Trelease recommendation and urges the Legislature to provide funding for additional technical and financial assistance to assure perfection of the Yellowstone reservations.

Proposed language:

Section 20. Section 85-2-316, MCA, is amended to read:

"(2) Upon receiving an application, the department shall proceed in accordance with 85-2-307 through 85-2-309. After the hearing provided in 85-2-309, the board shall decide whether to reserve the water for the applicant. ~~[The department's costs of giving notice, holding the hearing, conducting investigations, and making records incurred in acting upon the application to reserve water, except the costs of salaries of the department's personnel, shall be paid by the applicant. In addition, a reasonable proportion of the department's cost of preparing an environmental impact statement shall be paid by the applicant unless waived by the department upon a showing of good cause by the applicant.]~~ The department's costs of evaluating the application, the cost of any environmental impact statement, and the cost of giving notice of and holding hearings on the application shall be paid by the department. "

"(12) The department shall undertake a program to educate the public, other state agencies, and political subdivisions of the state as to the benefits of the reservation process and the procedures to be followed to secure the reservation of water. The department shall provide technical and financial assistance to other state agencies and political subdivisions in applying for reservations under this section."

NEW SECTION. Section 21. Reservations within the Missouri River basin.

(1) The state or any agency or political subdivision thereof or the United States or any agency thereof that desires to apply for a reservation of water in the Missouri River basin shall file a claim pursuant to 85-2-316 no later than July 1, 1986.

(2) The department shall provide technical and financial assistance to other state agencies and political subdivisions in applying for reservations within the Missouri River basin.

(3) Before July 1, 1987, the board shall make a final determination in accordance with 85-2-316 on all applications filed before July 1, 1985, for reservations of water in the Missouri River basin.

12. STATE WATER PLAN

Recommendation:

The committee strongly urges DNRC to comply with the provisions of MCA § 85-1-203 which requires the preparation of a state water plan, its approval by the Board of Natural Resources and Conservation, and its submission to each general session of the Legislature.

Commentary:

Section 85-1-203, MCA, which was originally passed in 1967 and revised in 1974, requires that the DNRC formulate, and, with the approval of the Board, adopt "a comprehensive, coordinated, multiple-use water resources plan" for the state. The plan, which can be formulated and approved in sections, is required to set forth "a progressive

program for the conservation, development, and utilization of the state's water resources and to propose the most effective means by which these water resources may be applied for the benefit of the people." The section requires that the plan be adopted only after properly noticed public hearings. Additionally, the plan must be submitted to each general session of the Legislature.

While DNRC has undertaken many specific water studies in the state, it is unclear whether those are considered by the department as being the state water plan. There have been no public hearings advertised in accordance with the statute. The Board has not approved any document or set of documents or component of the plan. Most importantly, no such plan has been submitted to the Legislature in preceding sessions. Although DNRC has given indications that such a "plan" will be submitted to the 1985 Legislature, whether it will have been scrutinized through the required public hearings is unclear. Thus, if the plain language of section 85-1-203 is applied, Montana does not have a state water plan.

Compliance with section 85-1-203 is no mere procedural nicety. It is an indispensable prerequisite for demonstrating, in any interstate apportionment action, that Montana has systematically and thoughtfully planned for its water future. The state is vulnerable to the extent it does not comply with its own statutory requirements for the development of the state water plan. Montana's equities are improved in an interstate setting if it develops a plan demonstrated as such and involving the public and the Legislature.

13. WATER DEVELOPMENT

Recommendation:

The committee recommends continued funding and bonding capacity for the identification, development, and construction of water projects within the state. The Department of Natural Resources and Conservation should prioritize potential federal projects that would qualify under the Pick-Sloan Plan and report this listing to the Legislature each biennium. In addition to monitoring developments and issues that affect the state, Montana's existing Washington, D.C. staff, in conjunction with the state's Congressional delegation, should work toward the authorization and funding of such projects.

Commentary:

Putting water to use is important for buttressing Montana's claim to its fair share of Missouri Basin water, and water development is important for putting the water to use.

In its hearings, the committee determined that DNRC was not actively seeking authorization or funding for water development projects which would qualify under the Pick-Sloan Plan. In the proposed amendments, the committee seeks to require DNRC, as a part of its biennial report to the legislature, to identify such potential projects and specify the efforts it will undertake to secure this authorization and funding. Also, the committee urges Montana's Washington, D.C. office and Congressional delegation to support these efforts.

Proposed language:

Section 22. Section 85-1-621, MCA, is amended to read:

"85-1-621. Report to the legislature. The department shall prepare a biennial report to the legislature describing the status of the water development program. The report must describe ongoing projects and activities and those which have been completed during the biennium. The report must identify and rank in order of priority the projects for which the department desires to seek congressional authorization and funding and the efforts the department will undertake in attempting to secure such authorization and funding. The report must also describe proposed projects and activities for the coming biennium and recommendations for necessary appropriations. A copy of the report shall be submitted to the president of the senate and the speaker of the house, to the members of the permanent water oversight committee created in [recommendation 14], and to such other members of the Legislature as may request a copy."

14. WATER POLICY COMMITTEE

Recommendations:

The committee recommends the creation of a permanent legislative water policy committee to advise the Legislature, in an ongoing manner, on water policy and issues of importance to the state.

Commentary:

Water is a resource particularly important to the future of Montana. Policies concerning water must not be made in a vacuum. Coordinated and well-reasoned policies must be developed with the participation of the Legislature, other involved agencies, and the public. In exercising its role in appropriating money or approving

compacts, the Legislature must understand the context of such actions and must accept them as integral parts of an overall state water strategy. Likewise, other agencies must be able to express their concerns about proposed policies and be able to express their concerns about proposed policies and be able to coordinate their own actions. Finally, the general public must understand the rationale for water policies so as to be supportive; and many citizens have valuable expertise to render in the development of water policy. These concerns argue for the creation of a permanent committee devoted to monitoring Montana's water policy.

During the next biennium, particularly important issues for discussion by such a committee could include:

- o constraints on consumptive use and water development brought about by extensive hydropower reservations in both the Missouri and Yellowstone basins;
- o oversight of the quantification of pre-1973, Indian, and federal reserved water rights;
- o the adequacy of the state's water resources data system, including the consideration of the adequacy of water research currently underway in state agencies and institutions, in meeting state policy and management needs; and/or
- o the content of the state water plan and water development plan.

The committee could be of particular value in developing communications with similar bodies in other Missouri Basin states.

Proposed language:

NEW SECTION. Section 23. Water Policy Committee.

(1) There is a permanent water policy committee of the legislature. The committee consists of eight members. The senate committee on committees and the speaker of the house of representatives shall each appoint four members on a bipartisan basis. The committee shall elect its chair and vice-chair. The committee shall meet as often as necessary, including during the interim between sessions to perform the duties specified within this section.

(2) On a continuing basis, the committee shall:

(a) advise the legislature on the adequacy of the state's water policy and of important state, regional, national and international developments which affect Montana's water resources;

(b) oversee the policies and activities of the department of natural resources and conservation, other state executive agencies, and other state institutions, as they affect the water resources of the state; and

(c) communicate with the public on matters of water policy as well as the water resources of the state.

(3) On a regular basis, the committee shall:

(a) analyze all comments on the state water plan required by 85-1-203, whenever filed by the department;

(b) analyze and comment on the report of the status of the state's water development program required by 85-1-621, whenever filed by the department;

(c) analyze and comment on the water-related research undertaken by any state agency or institution; and

(d) report to the legislature, not less than once every biennium.

(4) The environmental quality council shall provide staff assistance to the committee. The committee may contract with experts and consultants, in addition to assistance from the environmental quality council itself, in carrying out its duties under this section.

"RELATING TO OTHER STATES IN THE MISSOURI RIVER BASIN"

15. PREPARATION FOR NEGOTIATIONS AND POSSIBLE LITIGATION

Recommendation:

The committee recommends that Montana prepare for negotiations and potential litigation with other Missouri River Basin states. Such preparation * might include:

(a) establishing a litigation contingency fund for the office of the attorney general;

(b) efforts to further develop Montana's legal, economic, and equitable arguments in support of the apportionment of Missouri River water contained in the O'Mahoney-Milliken Amendment;

* These specific recommendations are tentative pending presentation of DNRC at December 3 meeting.

(c) additional efforts to monitor federal and regional activities which affect Montana's water interests (especially water project funding and coal slurry legislation);

(d) intensive modeling of the interests and anticipated water strategies of other basin states;

(e) developing a negotiating team on compacting; and

(f) resolving issues remaining outstanding from the execution of the Yellowstone River Compact.

The committee recommends that \$_____ be appropriated to support these efforts.

Commentary:

Montana needs to have a thoughtful strategy regarding its relationship with other states in the Missouri River Basin. This strategy must encompass what policies Montana wishes to work for in the basin, as well as what posture Montana will take in relation to the actions of the other basin states. This strategy requires preparation for both litigation and negotiation.

While nonjudicial conflict resolution is preferable in most instances, it is inevitable that the State of Montana will have to engage in some litigation concerning Missouri Basin water issues. The Attorney General's office and DNRC must be prepared for the inevitability of such litigation. The Trelease report recommended several measures to prepare the state: a contingency fund for litigation; further development of Montana's position based on the

O'Mahoney-Milliken Amendment; monitoring federal and regional development; and, modeling other states' interests and strategies.

Even though there is growing interest in the negotiation of an interstate compact to apportion the waters of the Missouri River among the basin states, some observers believe that none of the states are ready for a compact. As for Montana, the Trelease report suggests that there is the preliminary need to resolve some of the unresolved issues remaining from the execution of the Yellowstone River Compact among Montana, Wyoming, and North Dakota.

16. EFFORTS TOWARD AN INTERSTATE COMPACT

Recommendation:

The committee recommends that efforts toward negotiating a compact among the states of the Missouri River Basin be given high priority by Montana. The DNRC should be the lead negotiating agent for the state, but the legislative water policy committee (proposed in recommendation 14) should meet with and engage in discussions with similar legislative groups from other basin states. Montana should host a conference or other appropriate gathering of legislators and executive branch personnel from other basin states as one means to further discussions toward a compact. *

Commentary:

It is predictable that the waters of the Missouri River Basin will eventually be allocated among the ten member states in the basin. That

* These recommendations are tentative pending presentation of DNRC on this issue at December 3 meeting.

apportionment could come about through litigation, Congressional action, or interstate compacting.

The provisions of the O'Mahoney-Milliken Amendment, which give the state preference with consumptive uses over the navigation uses downstream, would be to Montana's advantage in litigation. Yet, as the lower states develop (probably at a rate faster than Montana), they will be putting water to use for municipal and industrial purposes - uses not automatically subordinated under the O'Mahoney-Milliken Amendment. As the water is put to use, the equities shift to the lower basin; and the U.S. Supreme Court, in an equitable apportionment criteria, is reluctant to reduce existing uses. Also, lower basin states may have the political clout to modify the Amendment; and, since they benefit from water not put to use upstream, they have a political incentive not to support upstream water development.

To protect its future claims to water, Montana might, on the one hand, undertake rapid water development or, on the other hand, rely on water planning and the water reservation process. But water development, though effective in making claim to the water, is expensive; and water planning and reservations, though relatively inexpensive, are of somewhat unknown value in interstate litigation.

Thus, interstate compacting offers an appealing alternative. Once executed, a compact can provide certainty in terms of present and future water entitlements. A well-written compact negates adverse judicial

action and, once ratified by Congress, places the interstate settlement in most instances beyond the subsequent reaches of Congress. Expensive water development need not be undertaken solely to establish water rights.

Yet, compacts do not solve everything. Many issues, such as Indian water rights, are typically not covered by such agreements. Also, in undertaking negotiations, states must be well prepared as to data covering the resource and their own present and future needs and expectations. Successful compacting requires a high level of commitment by each of the individual states.

So long as the state's negotiators are well prepared, Montana has little to lose and much to gain by actively pursuing a compact among the states in the basin.

D. MISCELLANEOUS PROVISIONS

17. MISCELLANEOUS PROVISIONS

Recommendation:

The committee recommends the passage of certain technical provisions in addition to the substantive provisions set forth in the foregoing.

Proposed language:

Section 24. Extension of authority. Any existing authority of the department of natural resources and conservation to make rules on the subject of the provisions of this act is extended to the provisions of this act.

Section 25. Effective date. This act is effective July 1, 1985.